SUPREME COURT, U. S.
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In The

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 894/77

JOHN L. GRADY et al., and FATIMA GRADY,

*Appellants,*

*— v —*

RODERICK A. McLEAN, M.D.,

*Appellee.*

## MOTION TO DISMISS APPEAL

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DATE: November 16, 1978

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*Appellants,*

— *v* —

RODERICK A. McLEAN, M.D.,

*Appellee.*

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## MOTION TO DISMISS APPEAL

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This is a motion to dismiss an appeal from an Order of the New York State Court of Appeals dated June 13, 1978, on the ground that said appeal is not within the jurisdiction of this court. The facts upon which the present motion is based are as follows:

Plaintiffs-appellants, John L. Grady and Fatima Grady, commenced this action in alleged medical malpractice against the defendant-appellee, Roderick A. McLean, by service of a summons and verified complaint on December 14, 1976. Thereafter, an amended verified complaint was served on January 10, 1977, and issue was subsequently joined by service of a verified answer on January 21, 1977. On or about January 18, 1977, a

further amended verified complaint was received by the attorneys for defendant-appellee McLean. An unverified answer was served in response on January 31, 1977, followed by the service of a verified answer on February 23, 1977. On May 27, 1977, plaintiffs-appellants chose to return the verified answer, dated February 23, 1977, alleging that service was untimely. Thus, a motion was made by defendant-appellee McLean for an Order compelling acceptance of the verified answer. The motion was granted, and by Order of the Supréme Court of the State of New York, Onondaga County dated June 13, 1977, (Tenney, J.), plaintiffs-appellants were directed to accept the verified answer to the further amended complaint. Plaintiffs-appellants did not take a timely appeal from said Order. Although a motion for relief from the Order was subsequently made, the motion was denied by Order of the Supreme Court, Onondaga County, dated August 8, 1977.

On June 8, 1977, based on the alleged untimely service of the defendant-appellee's verified answer, plaintiffs-appellants served a "Notice of Application for Judgment in Default", together with a note of issue and statement of readiness. In response, attorneys for defendant-appellee McLean opposed the application for default judgment, and also cross moved for an Order striking the note of issue and statement of readiness as untimely. A cross-motion was also made requesting an Order directing the plaintiffs-appellants to supply authorizations to obtain all medical and hospital records of the plaintiff, Fatima Grady, pursuant to New York CPLR Article 31. Plaintiffs-appellants in turn responded with a motion for a protective order pursuant to New York CPLR 3103, denying the defendant a physical examination of the plaintiff, as well as access to her medical and hospital records.

By memorandum decision of the Supreme Court, Onondaga County, dated July 14, 1977, defendant-appellee McLean's cross-motion was granted in all respects, and plaintiffs-appellants' motion for a protective order was denied. Thereafter, an Order of the Supreme Court, Onondaga County, dated



July 21, 1977, was entered accordingly. (Exhibit A) Although plaintiffs-appellants perfected a timely appeal from said Order to the Appellate Division, 4th Department of the New York Supreme Court, the decision of the lower court was unanimously affirmed, and the Appellate Division's Order of affirmance was subsequently entered on April 14, 1978. (Exhibit B)

On or about May 2, 1978, plaintiffs-appellants appealed to the Court of Appeals of the State of New York, pursuant to New York CPLR 5602. In response, attorneys for defendant-appellee McLean moved to dismiss the appeal. By Order of the Court of Appeals of the State of New York dated June 13, 1978, the motion of defendant-appellee McLean was granted upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution. (Exhibit C) Thereafter, on July 7, 1978, attorneys for defendant-appellee McLean received a Notice of Appeal to this Court from the aforementioned Order of the Court of Appeals.

Plaintiffs-appellants' jurisdictional statement in support of the present appeal was received by attorneys for defendant-appellee McLean in August of 1978. It should be noted that this statement makes reference to a number of orders obtained during the course of this litigation, including the aforementioned orders dated June 13, 1977 and August 8, 1977. It is respectfully submitted that the only Orders which are relevant to this appeal are the Order of the Court of Appeals dated June 13, 1978, which is the basis for this appeal, and the underlying orders of the Supreme Court, Onondaga County dated July 21, 1977, and the Appellate Division, 4th Department, dated April 14, 1978.

It is the position of defendant-appellee McLean that the jurisdictional statement of plaintiffs-appellants does not present a proper jurisdictional basis for granting an appeal to this court. Plaintiffs-appellants contend that jurisdiction is conferred by Title 28, United States Code, Sections 1257, 1292, 2283, 1252, 1254, 165(a), 1331, and Title 42, United States

Code 1983. It is submitted that the only section referred to by plaintiffs-appellants which is even remotely relevant to the issue at bar is Section 1257. In substance, Section 1257 indicates that final judgments of a state's highest courts may be reviewed on appeal where the validity of a state or federal statute is at issue. It is respectfully submitted that the requirements for review by this court pursuant to Section 1257, have not been met. As noted by the Order of the Court of Appeals, and as indicated by the nature of the underlying motion and order of the Supreme Court, Onondaga County, dated July 21, 1977, the primary requirement of finality has not been met. Furthermore, it is evident that the validity of a federal or state statute has not been drawn in question during the course of this litigation.

WHEREFORE, defendant-appellee McLean respectfully requests an Order dismissing plaintiffs-appellants appeal, together with any further relief the court may find just and proper.

Respectfully submitted,

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EXHIBIT A – Order of Supreme Court, Onondaga County.

At a Special Term of the Supreme Court of the County of Onondaga at the Court House thereof located in Syracuse, New York on the 27th day of June, 1977

PRESENT: HON. EDWARD F. McLAUGHLIN
Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

JOHN L. GRADY and FATIMA GRADY,
Plaintiffs

– vs –

RODERICK A. McLEAN, M.D.,
Defendant

ORDER
Index No. 894/77

A motion having been made by the plaintiffs herein for a protective order pursuant to CPLR 3103 denying the defendant a physical examination of the plaintiff, Fatima Grady, and access to hospital and medical records pertaining to the care and treatment of said plaintiff alleged as a result of the alleged medical malpractice of the defendant, and a cross motion having been made on behalf of the defendant for an order pursuant to Article 31 of the CPLR requiring plaintiffs to supply duly executed authorizations to obtain said hospital and medical records and for a physical examination of the plaintiff Fatima Grady and for a further order striking the plaintiffs' note of issue and statement of readiness filed herein,

NOW, upon the reading and filing of the notice of motion and affidavits of FATIMA GRADY and JOHN L. GRADY, sworn to the 20th day of June, 1977, all with proof of due

*EXHIBIT A — Order of Supreme Court, Onondaga County.*

service and in support of plaintiffs' motion and upon the reading and filing of the affidavit of GEORGE F. MOULD, sworn to the 17th day of June, 1977, and the notice of cross motion dated June 17, 1977, all with proof of due service and in support of defendant's motion, and upon the appearance of JOHN L. GRADY and FATIMA GRADY in support of the plaintiffs' motion and in opposition to defendant's cross motion and upon the appearance of EDWARD J. AMSLER, ESQ., in support of defendant's cross motion and in opposition to plaintiffs' motion, and upon the Memorandum Decision of the HON. EDWARD F. McLAUGHLIN, dated July 14, 1977,

NOW, upon the motion of MARTIN, GANOTIS, AMSLER & BROWN, attorneys for defendant, it is hereby

ORDERED that within thirty (30) days after service of a copy of this Order with notice of entry upon the plaintiffs, that plaintiffs serve upon attorneys for the defendant duly executed authorizations to obtain any and all hospital records concerning hospitalizations of the plaintiff FATIMA GRADY and duly executed authorizations to obtain records of said plaintiff's treating physicians from September, 1971 to the present, and it is further

ORDERED that within thirty (30) days of service of a copy of this Order with notice of entry upon the plaintiffs that plaintiff FATIMA GRADY appear and be physically examined by a physician of defendant's choosing and it is further

ORDERED that plaintiffs' motion for a protective order is in all respects denied, and it is further

ORDERED that the plaintiffs' note of issue and statement of readiness filed herein be stricken.

DATED: July 21, 1977.

s/ EDWARD F. McLAUGHLIN
J.S.C.

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**EXHIBIT B — Order of the Appellate Division, Fourth Department.**

SUPREME COURT OF THE STATE OF NEW YORK
*Appellate Division, Fourth Judicial Department*

PRESENT: MARSH, P.J., MOULE, CARDAMONE, HANCOCK, WITMER, JJ.

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John L. Grady and Fatima Grady, Appellants,

v.

Roderick A. McLean, Respondent.

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The above named John L. Grady and Fatima Grady, plaintiffs in this action, having appealed to this Court from an order of the Supreme Court, entered in the Onondaga County Clerk's office on July 14, 1977 and said appeal having been argued by John Grady for appellants, David Brown of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the order so appealed from be, and the same hereby is unanimously affirmed without costs.

Entered: April 14, 1978

MARY F. ZOLLER, Clerk

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**EXHIBIT C – Order of the Court of Appeals of the State of New York.**

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirteenth day of June A.D. 1978

Present, HON. CHARLES D. BREITEL,
Chief Judge, presiding.

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4 Mo. No. 523
John L. and Fatima Grady,
Appellants,

vs.

Roderick A. McLean, M.D.,
Respondent.

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A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellants in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution.

s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court